INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	7
Conclusion	11
Appendix	13

CITATIONS

Cases:

Franks Bros. Co. v. *National Labor Relations Board*, 321 U.S. 702	10
Graver Mfg. Co. v. *Linde Co.*, 336 U.S. 271	7
Indiana Rayon Corp. v. *National Labor Relations Board*, 355 F. 2d 535	11
International Ladies' Garment Workers' Union v. *National Labor Relations Board*, 366 U.S. 731	9
National Labor Relations Board v. *Cactus Petroleum, Inc.*, 355 F. 2d 755	10
National Labor Relations Board v. *Herman Wilson Lumber Co.*, 355 F. 2d 426	11
National Labor Relations Board v. *Warren Co., Inc.*, 350 U.S. 107	10

282-905—67

Statute:

National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*:

	Page
Section 7	10, 13
Section 8(a)(1)	2, 11, 13
Section 8(a)(5)	2, 13
Section 8(c)	10
Section 8(d)	14
Section 9(a)	14

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 769

SKYLINE HOMES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 27–32) adjudging petitioner in civil contempt of an earlier decree of that court is reported at 381 F. 2d 706. The opinion of the court of appeals in the earlier proceeding is reported at 323 F. 2d 642. The Board decision which underlies these proceedings is reported at 134 NLRB 155.

JURISDICTION

The decision of the court of appeals adjudging petitioner in civil contempt was entered on August 11, 1967, and a petition for rehearing was denied on

September 22, 1967. The petition for a writ of certiorari was filed on October 27, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The court of appeals, in a prior proceeding, enforced portions of a Board order requiring the employer, *inter alia,* to bargain collectively with the union upon request, and to post appropriate notices at its plant. The question presented is whether the court of appeals was warranted in finding that, by its conduct subsequent to the entry of the court's earlier decree, the employer continued to refuse to bargain in good faith with the union and failed to post the required notices, and that the employer was thus in civil contempt of that decree.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in the Appendix, *infra,* pp. 13–14.

STATEMENT

In an earlier proceeding, the court of appeals sustained the Board's finding that petitioner Company had refused to bargain with the Union,[1] in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (323 F. 2d 642). The court found that the Company's refusal to recognize the Union and its in-

[1] "Union" refers to United Brotherhood of Carpenters and Joiners of America, Carpenters Union No. 2292.

sistence that the Union first establish that it had the support of a majority of the employees in a Board election were not in good faith, but only a stratagem for gaining time in order to dissipate the Union's majority, as was evidenced by the other unfair labor practices in which the Company had engaged (*id.* at 648–649).

The court accordingly enforced the Board's order, entering a decree which directed the Company, *inter alia,* to cease and desist from refusing to bargain collectively in good faith with the Union, to bargain with the Union upon request, and to post, immediately upon receipt, copies of the Board's remedial notice at its plant in Ocala, Florida (see Pet. 28, n. 2). Subsequently, the Company's petition for certiorari from this decision was denied by this Court (376 U.S. 909).

In mid-March 1964, following the denial of the Company's certiorari petition, the Union requested the Company to meet with it on March 20 to commence bargaining (Pet. App. 3; PX 1).[2] At the same time, the Union advertised a meeting with the employees for March 19 (Pet. App. 3; PX 2). On March 17, the Company agreed to "meet" with the Union at the Ocala plant on the requested date (Pet. App. 3; PX 3). The same day the Company sent a letter to each employee, advising that the employees did not have

[2] "Tr.", "PX", and "RX" references are to the transcript of testimony, the Board's exhibits, and the Company's exhibits presented at the hearing before the Special Master appointed by the court below (see Pet. 23–26). References preceding a semi-colon are to the Special Master's Findings; those following are to the supporting evidence.

to attend the Union meeting, and adding (Pet. App. 3; PX 4):

> If there are a majority of you (as we believe it to be a fact) who do not desire to belong to the union, you will be afforded an opportunity to express your opinion by secret ballot at an election to be held by the National Labor Relations Board.

On March 19, the Company's counsel—claiming that the Company had lost the notices to employees which the Board's Regional Office had previously sent it for posting as required by the court's decree [3]—requested replacements from the Regional Office (Pet. App. 3–4; Tr. 285). Counsel also sought to file a petition at the Regional Office, seeking a representation election in the bargaining unit at the Ocala plant (Pet. App. 4; PX 5). Regional officials furnished additional copies of the requested notices, but advised the Company's counsel that no question concerning representation could be raised in view of the decree requiring the Company to bargain with the Union (Pet. App. 4; Tr. 285, 288, PX 6). After working hours on March 19, the Company, for the first time, complied with the notice-posting requirements of the court's decree (Pet. App. 4; Tr. 89).

At the initial meeting between the Union and the Company on March 20, the Union asked the Company's counsel, who was also its chief spokesman, to send a letter to the employees correcting the misstatements in the letter of March 17 regarding the possi-

[3] Copies of the notice had been sent to the Company on February 20 (Pet. App. 9; PX 22).

bility of a Board-conducted representation election (Pet. App. 4; Tr. 92). The Company's counsel refused, and instead, on March 20, the Company sent a letter to all employees stating in pertinent part (Pet. App. 4; Tr. 92, PX 8):

> [W]hat we have told you, in response to your questions, is supported by the National Labor Relations Board; namely you do not have to attend meetings if you do not want to, and you do not have to have the Union represent you if you do not want to.

On March 24, the Company insisted upon filing its representation petition (Pet. App. 5; PX 9). The Regional Director dismissed the petition because it was "premature and untimely" (Pet. App. 5; PX 11). The Company filed a request for review of the Regional Director's action with the Board, which request was later denied (RX E, PX 12).

At the next meeting between the parties, on April 2, the Union asked the Company whether, in view of its letter of March 17 to the employees and its petition for an election, it recognized the Union as the employees' exclusive bargaining agent (Pet. App. 5, 10; Tr. 95, 214–215). The Company replied that it would do what the Board's order said—that it would "negotiate," but reserved the right to appeal the Regional Director's dismissal of its representation petition (Pet. App. 7; Tr. 95, 159, 215). When the Union began its presentation of contract proposals, the Company declared that it would bargain only about a short contract of two or

three pages, dealing only with wages and hours and "day-to-day" terms and conditions of employment such as sanitary facilities (Pet. App. 5; Tr. 96, 97, 137, 161, 164, PX 19). The Union concluded that further negotiations would be futile, and requested a two-week recess to enable it to draft a shortened contract (Pet. App. 10; Tr. 174, PX 20). The Union then decided that, before resuming negotiations, it would again seek recognition; so, on April 6, it wrote a letter to the Company seeking recognition as the exclusive bargaining agent for employees at the Ocala plant (Pet. App. 6; Tr. 175–177, RX I). In reply, the Company did not refer to the Union's request, but only insisted on a date for the next meeting, "even though you do not represent a majority of the employees of Skyline Homes, Inc." (Pet. App. 6; RX J).

On April 24, and again on June 5, the Union expressed its willingness to meet with the Company upon receipt of notification that the Company recognized the Union as the employees' bargaining agent (Pet. App. 6–7; RX Q, PX 17). In both instances, the Company refused to accord the Union such recognition (Pet. App. 6–7; RX R, PX 18). The Company also refused the Union's requests that it retract its letters of March 17 and 20 to the employees (Pet. App. 6–7; PX 15, 16, 18). Negotiations did not resume (Pet. App. 7).

On the basis of the foregoing evidence, the court of appeals, in agreement with the Special Master, held

that there was "clear and convincing proof" that the Company had acted in bad faith by (Pet. 29–30):

> * * * sending erroneous and misleading letters to the employees as to the relationship between the Union and the employees, by questioning the existence of, and refusing to give expression to, the Union's status as the exclusive bargaining agent, by delaying the posting of Board notices, and negating the effect of the notices when they were finally posted, and finally by restricting negotiations to "day-to-day" terms and conditions and thereby excluding other non-economic, but mandatory, subjects of bargaining.

Accordingly, the court concluded that the Company had violated the decree previously entered and was thus guilty of civil contempt (Pet. 30), and entered an appropriate decree requiring the Company to purge itself of the contempt (Pet. 30–32).

ARGUMENT

1. Petitioner's basic contention is that the record does not provide clear and convincing support for the findings of the court of appeals that the Company failed to bargain in good faith and that it willfully delayed in posting the notices to employees (Pet. 6, 13–21). Such evidentiary issues do not warrant review by this Court. Cf. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.

In any event, the record amply supports the court's findings. The credited and undenied evidence shows that, following the Union's request for negotiations in mid-March 1964, the Company, notwithstanding the outstanding decree requiring it to bargain with the Union, on two occasions advised its employees that, if

a majority of them did not wish to be represented by the Union, a Board-conducted election would afford them an opportunity to revoke the Union's bargaining authority (*supra,* pp. 3–5). It is also uncontroverted that, thereafter, the Company insisted upon filing a petition for a representation election at its Ocala plant, despite prior advice from Board agents that such a challenge to the Union's representative status was untimely (*supra,* pp. 4–5). Finally, the record shows that, on and after April 2, the Company refused to accord recognition to the Union as the exclusive bargaining agent of its Ocala employees, and it restricted negotiations to "day-to-day" terms and conditions of employment, thus excluding other non-economic but mandatory bargaining subjects from negotiations (*supra,* pp. 5–6; Tr. 164).

In regard to the notices, the record further shows that the Company received them soon after February 20, and that it did nothing to comply with the decree's posting requirement until after the close of work on March 19 (*supra,* p. 4). Nor is there any evidence in the record to support the Company's assertion that it misplaced the first set of notices. Moreover, when the Company finally posted the notices, the following day it sent a letter to the employees stating that, "you do not have to have the Union represent you if you do not want to" (*supra,* p. 5).

Upon this record, the court of appeals was fully justified in concluding that the Company had failed and refused to bargain with the Union in good faith,

and had willfully delayed posting the notices to employees, all in violation of the earlier decree.[4]

2. Petitioner's claim (Pet. 8) that the instant decision is in conflict with *International Ladies' Garment Workers' Union* v. *National Labor Relations Board,* 366 U.S. 731, is plainly without substance. That case involved recognition of a union which, at the time it was first recognized, represented only a minority of the employees. Here, on the other hand, it is clear that the Union represented a majority of the employees when it first sought recognition; indeed, that was a necessary predicate for the bargaining order originally enforced by the court of appeals (323 F. 2d at 648). Nor is it material that the Union may have thereafter lost its majority. Where, as here, an employer has been found guilty of an unfair labor practice in refusing to "bargain exclusively with the particular union which represented a majority of the employees at the time of the wrongful refusal," the Board may properly require the employer to bargain with that union "despite that union's subsequent fail-

[4] Petitioner's contention (Pet. 17) that the court of appeals acted inconsistently in "substantially adopt[ing] the conclusions and findings of the Master" (Pet. 30), since the Master had stated that a contempt finding could not be grounded on a refusal "to agree on a recognition clause in a contract * * *" (Pet. App. 10), is without substance. Irrespective of the correctness of this statement, the Master went on to find that petitioner had violated the earlier decree requiring the Company to bargain with the Union. In short, petitioner was held in contempt of that decree upon the basis of overwhelming evidence of non-compliance with the bargaining requirement, not merely because it failed to recognize the Union or because no agreement was reached.

ure to retain its majority." *Franks Bros. Co.* v. *National Labor Relations Board,* 321 U.S. 702, 705.[5] See also *National Labor Relations Board* v. *Warren Co., Inc.,* 350 U.S. 107, 112.[6]

3. There is similarly no merit to petitioner's contention (Pet. 8–13) that the court of appeals, in relying upon the Company's letters of March 17 and 20 to its employees, contravened the First Amendment to the Constitution and Section 8(c) of the Act.[7] The Company's misleading and erroneous assertions in the letters were not found unlawful in and of themselves, but were merely used as evidence of the Company's intent to act contrary to the clear direction of the court's decree. Neither the First Amendment, nor

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[5] Petitioner's contention (Pet. 21) that the instant decision is in conflict with *National Labor Relations Board* v. *Cactus Petroleum, Inc.*, 355 F. 2d 755 (C.A. 5), is equally without merit. That case involved a situation where, in the court's view, the employer could properly claim a good-faith doubt as to the union's majority status, so that no violation of the statutory duty to bargain, on the particular facts, could be found. Here, on the other hand, the Company was under a specific court decree requiring it to bargain collectively with the Union. Thus, it could not properly invoke a possible loss of majority status as a justification for its non-compliance with the bargaining order embodied in the court's earlier decree.

[6] Employees, of course, have a Section 7 right to refrain from organizational activity, but, in light of the earlier decree requiring bargaining with the Union, petitioner's reliance on Section 7 (Pet. 6–7) is misplaced. Similarly, the fact that Florida has a "right to work" clause in its constitution (see Pet. 12) is, in the instant circumstances, without significance.

[7] Section 8(c) of the Act provides in pertinent part that: "The expressing of any views, argument, or opinion, or the dissemination thereof, * * * shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

Section 8(c), precludes the use of such letters for that evidentiary purpose.[8]

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1967.

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[8] *Indiana Rayon Corp.* v. *National Labor Relations Board*, 355 F. 2d 535 (C.A. 7) and *National Labor Relations Board* v. *Herman Wilson Lumber Co.*, 355 F. 2d 426 (C.A. 8), relied on by petitioner (Pet. 8), are clearly distinguishable. Each of the cited cases involved allegations that an employer's statement to employees violated Section 8(a)(1) of the National Labor Relations Act, in that the statement itself contained a threat of reprisal or a promise of benefits; there the courts simply concluded that the statements constituted mere expressions of opinion, and thus were not violative of the Act.